IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.705 OF 2003
IN
SUMMARY SUIT NO.829 OF 2003

Fortis Financial Services Ltd. Plaintiff

versus

M/s.Good Value Marketing Co. Ltd. and another Defendants

Ms.Dholakia i/by Dholakia Gupte & Co. for plaintiff.
Mr.Cyrus Ardeshir i/by Madekar & Co. for defendants.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 11th July 2005
PC :

1. This Summons for Judgement is in a summary suit instituted by a non banking finance company. The business of plaintiff non banking finance company is set out in para 1 of the plaint.

2. Present Summons for Judgement is directed against both defendants. However, it is pointed out that defendant no.1 has approached BIFR and a reference being Case No.140 of 2003 is pending. It is pointed out that as long as the reference is pending, the relief namely decree as against first defendant cannot be granted. Reliance is placed upon Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985

(hereinafter referred to as "SICA" for short). Learned counsel appearing for plaintiff agrees that unless the necessary consent or approval of the Board is obtained or the reference is disposed off otherwise, present Summons for Judgement praying for judgement/decree against first defendant cannot proceed. Therefore, hearing of Summons for Judgement and the summary suit is adjourned sine die insofar as defendant no.1.

3. Now, the Summons for Judgement survives as against defendant no.2. Learned counsel appearing for plaintiff submits that Section 22 can have no application insofar as claim against defendant no.2. She submits that defendant no.2 has been sued as Guarantor who has guaranteed payment of amount due and payable to the plaintiff under a Lease Agreement. She submits that to such a transaction provisions of section 22 of the SICA can have no application. In this behalf she places strong reliance upon a decision of this Court reported in AIR-2002-Bombay-8. She submits that the words "suspension of legal proceedings" can by no stretch of imagination cover amounts guaranteed by a guarantor under a lease agreement. She submits that the words "or

of any guarantee in respect of any loans, or advances granted to the Industrial Company" clearly demonstrate that Section 22(1) of SICA would apply only if guarantee is given in respect of any loans or advances granted to the industrial company. Present guarantee is in respect of amounts due and payable under a lease agreement and to such a guarantee, bar under section 22(1) of SICA would not apply. She submits that a Division Bench of this Court also had an occasion to consider this aspect of the matter in a decision reported in 2004(4)-BCR-578. In fact, view of learned Single Judge (supra) is taken note of by the Division Bench.

4. On the other hand, Mr.Ardeshir appearing for defendant no.2 contends that Section 22 of SICA is clear and the words appearing therein have to be interpreted literally. So interpreted, there is no scope for making any distinction on the basis of a lease agreement or otherwise. He submits that Section 22 has provided for suits for recovery of money and in the present case even against the guarantor a money decree is claimed. Therefore, when the said provision deals with guarantee and protection thereof is not denied to the guarantors as well, then the

bar must apply squarely. He relies upon a judgement of Supreme Court in the case of Patheja Brothers Forgings and Stamping Limited Vs. ICICI limited reported in 2000(6)-SCC-545.

5. I am unable to accept contention of Mr.Ardeshir. The law laid down by Division Bench apart from binding upon me has my respectful concurrence. The provisions only apply when guarantee is given to secure claims arising out of loans or advances granted to the industrial company. In other words, only if the guarantee is in respect of any loans or advances granted to the industrial company, only then the guarantor is protected. It is only in such cases that no suit for recovery of money or for the enforcement of any guarantee would lie against the guarantor or can proceed except with the consent of the Board or, as the case may be, the appellate authority. No reference is necessary to any decisions. In the present case, the averments in the plaint that the guarantee pertains to amounts due and payable by first defendant under a lease agreement, are not denied. Defendant is sued in his capacity as a guarantor because he has guaranteed repayment of amounts under the lease agreement. Once this is the position, then

Section 22(1) of SICA can have no application and the Summons for Judgement and the summary suit can proceed.

6. Coming to the merits, Ms.Dholakia - learned counsel appearing for plaintiff vehemently contends that there is no dispute that a lease agreement was executed between plaintiffs and first defendant. There is no dispute that in consideration of this facility, defendant no.2 who is the Chairman and Managing Director of defendant no.1, executed at Mumbai the Deed of Guarantee. Inviting my attention to the Deed of Guarantee which is annexed to the plaint at Exhibit-B, she submits that the guarantor (defendant no.2) has guaranteed repayment of the dues and the guarantee is enforceable. She submits that clauses 9, 12 and 16 are absolutely clear. In the light of this admitted position, second defendant cannot escape the liability.

7. Ms.Dholakia further contends that apart from making payment of only Rs.10,42,424/-, the first defendant made no payment under the lease agreement. In these circumstances, letters were addressed to defendants 1 and 2. Defendants 1 and 2 have admitted their liability to make

payment but have sought extensions. Therefore, on 11th April 1997 a letter was addressed to second defendant calling upon him as guarantor to make payment of the sum then outstanding i.e. Rs.90,41,623/-. Second defendant has not disputed his liability nor has he complied with the demand raised on him. It is in these circumstances that the present summary suit is filed and the Deed of Guarantee being a written contract and the liability admitted, a decree against second defendant must follow.

8. Mr.Ardeshir, on the other hand, has raised several contentions. His first submission is that the claim in the suit is time barred. He submits that the guarantee has been invoked by the plaintiff vide demand notice dated 11th April 1997. However, the suit is filed on 25th February 2003. He submits that in para 16 of the plaint part payment is relied upon. However, that part payment is beyond the period of three years from the date of invocation of guarantee, and therefore, that aspect would not save limitation. Thus, period of limitation being three years, the suit filed admittedly after three years of invocation is time barred. He relies upon judgements of this Court and the

Hon’ble Supreme Court as well as other Courts in this behalf. His second contention is that averments in para 16 of the plaint in any event would not save the bar of limitation. He has taken me through the affidavit in reply and submitted that triable issue is raised insofar as limitation is concerned, and therefore, unconditional leave to defend should be granted.

9. He submits that no machineries were delivered to defendant no.2 under the lease agreement. No machineries of whatsoever description were installed by the plaintiff at any point of time. In other words, the suit transaction is not a lease transaction but a finance arrangement. For all these reasons he submits that unconditional leave be granted.

10. Ms.Dholakia with a view to clarify the averments in para 16 of the plaint has filed a further affidavit. She states that this further affidavit is filed only as and by way of precaution. She states that averments in para 16 cannot be read to mean that payment was made on 24th August 2001. On the other hand, the averments are clear inasmuch as payment was made till 24th August 2001 but thereafter no payment

has been made. This aspect becomes clear if one peruses the details of part payments made from time to time. The figure of Rs.12,32,424/- appearing in para 16 is correct. Only details of payments are set out in this further affidavit. These payments are reflected in a statement as well as entries in that behalf are made in the accounts of plaintiff's bankers. She, therefore, submits that because of acknowledgement of liability by defendants 1 and 2 by letter dated 29th January 1998 and the part payments made from time to time, the bar of limitation would not apply.

11. With the assistance of learned counsel appearing for both sides I have perused the plaint, annexures thereto and affidavits filed in reply and rejoinder. In my view, there is no substance in the contention of Mr.Ardeshir that the transaction in question was not a transaction of lease but a finance transaction. Such plea is taken for the first time in the affidavit filed in 2005. On the other hand, both, company as well as second defendant, have consistently taken a stand that transaction in question is a lease transaction, that the liability is towards lease rentals and that assets/equipments are supplied

pursuant thereto. In this view of the matter, a bald statement on affidavit about nature of transaction is, therefore, unacceptable.

12. The contention that the suit claim is barred by limitation, prima facie, does not appear to be sound. Although reliance is placed on Sections 18, 19 and 20 of the Limitation Act and judgements rendered by several Courts and the Hon’ble Supreme Court, in my view, in the latest decision the Supreme Court has held that Courts generally lean in favour of a liberal construction of such statements though an acknowledgement shall not be inferred where there is no admission. So long as the statement amounts to an admission, acknowledging the jural relationship and existence of liability, it is immaterial that the admission is accompanied by an assertion that nothing would be found due from the person making the admission or that on an account being taken something may be found due and payable to the person making the acknowledgement by the person to whom the statement is made (See - 2004(12)-SCC-360). Further, the earlier view seems to be some what diluted inasmuch as the Supreme Court observed that the rigour of Section 3 of the Limitation

Act, 1963 is required to be construed in a broad based and liberal manner (See - 2004(2)-SCC-749). In the present case, it is clear that the letter dated 29th January 1998 is addressed by the company and after setting out details of post dated cheques this is what is stated :-

> "We once again remind you not to deposit the aforesaid cheques on the due dates as the company in financial crisis which was not foreseen by us at the time of issue of the post dated cheques. We also want to inform you by the enclosed letter the names of the Executive Directors and Directors who have already resigned from the directorship of the company.
>
> As soon as the company will arrange for finance we will inform you and thereafter resolve the problems of the outstanding dues by mutual consent."

Thus, there is acknowledgement and admission of liability. That post dated cheques in due discharge thereof are handed over is also admitted. Part payments are, therefore, clearly made after the invocation of guarantee till 24th August 2001. Therefore, in my view, there is no reason to disbelieve the version set out in para 16 of the plaint. However, with a view to grant opportunity to the defendant to make good his case on limitation, conditional leave can be granted. This is because once liability is

acknowledged and there is evidence of part payment, unconditional leave should not be granted. Therefore, insofar as applicability of Section 22 of SICA is concerned, that issue is concluded against defendant no.2. He is a guarantor. His version is not that the guarantee was not executed. Since technical plea of limitation is raised, in my view, following order would meet the ends of justice.

13. ORDER :- A) Suit is adjourned sine-die as against defendant no.1 in the light of Section 22(1) of SICA.. Liberty to apply to plaintiffs to have this Summons for Judgement placed for hearing and final disposal after proceedings before BIFR are disposed off or the BIFR grants necessary sanction under section 22(1) of SICA.. Insofar as defendant no.2 is concerned, conditional leave to defend is granted on deposit of Rs.85.00 lakh (Rs.Eighty five lakh only) within a period of 16 weeks from today. If the amount is deposited within the time stipulated above, suit shall stand transferred to the list of commercial causes with usual directions to file written statement, discovery and inspection. Needless to state that if the amount is not so deposited, further consequences in law would

follow.

B) Liberty to plaintiffs to apply for withdrawal of the amount if deposited and such application would be dealt with on its own merits and in accordance with law.

(S.C.DHARMADHIKARI, J.)